

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

DUKE KELSO CONSTRUCTION, INC. ,

Plaintiff and Respondent,

v.

JOHN ALBERT SILVA, et al.,

Defendants and Appellants.

H036879

(Monterey County

Super. Ct. No. M93312)

Plaintiff and respondent Duke Kelso Construction, Inc. (Contractor) sued defendants and appellants John Albert Silva (Silva) and Susan Silva (jointly Owners)<sup>1</sup> for breach of contract and other claims arising out of the construction of a single family residence in Soledad, California. Contractor was the general contractor for the project. After several months on the job, Contractor stopped working because of alleged breaches by Owners, including delaying payment and interfering with the parties' written cost plus contract by hiring their own subcontractors and suppliers. In a court trial, the court awarded Contractor \$52,294.30 in contract damages. Owners appeal from the \$52,294.30 judgment and from an order after judgment awarding Contractor \$53,185 in attorney fees.

---

<sup>1</sup> John Silva testified at trial; Susan Silva did not. We shall therefore refer to John Silva as "Silva" and the Silvas jointly as "Owners."

The parties' cost plus contract entitled Contractor to "costs incurred by the contractor," plus 15 percent profit and overhead based on those costs. Owners contend on appeal that the court erred when it awarded Contractor 15 percent of the amounts paid directly by Owners to certain suppliers and subcontractors hired directly by Owners because those were not costs incurred by Contractor. Owners also challenge the sufficiency of the evidence to support the award in favor of Contractor, including attorney fees. And with respect to attorney fees, Owners argue that Contractor waived any claim to attorney fees because the contract required the parties to arbitrate rather than litigate disputes.

We conclude that Contractor was entitled to profit and overhead on amounts Owners paid directly to vendors. But certain mathematical errors were made in the calculation of the award, and Contractor was not entitled to amounts billed for its superintendent's time or for profit on amounts billed for extraordinary accounting expenses. Since those amounts are readily discernible, we shall modify the judgment to adjust for these errors, thereby reducing the judgment by \$10,038.79 to \$42,255.51. As modified, we will affirm the judgment, and we will also affirm the award of attorney fees.

## **FACTS**

### ***I. Description of Project & Preliminary Work***

In June 2006, Duke Kelso (Kelso) learned that Owners planned to build an 8,000 square-foot house at 32750 Sanchez Road in Soledad. The property was located on a 1,000-acre working ranch owned by Silva's father. The project was in its early stages and Kelso helped Owners obtain permits for the project. The parties disputed the nature of their relationship at that time. Kelso testified that Owners hired him to "help facilitate getting all the permits," that Silva agreed to pay Kelso \$80 per hour for his time, and that Kelso spent 50 to 70 hours working on the permits. Silva testified that Kelso was doing

Owners a favor by working on the permits, that Kelso hoped to get the contract, and that he was soliciting Owners' business by working on the permits. A few months later, Owners and Contractor entered into a cost plus contract to build the house.

## ***II. Contract Provisions***

Owners and Contractor signed a written contract on September 5, 2006. Among other things, the contract provided in paragraph 4.1 that the contract price "shall be calculated on a cost plus coordination basis, with all labor, materials, permits and insurance figured as costs. Costs are defined as any costs incurred by the contractor for materials, permits and subcontract services. Labor will be billed at current billing rates as set forth in [paragraph] 4.5. Construction coordination services shall be charged at 15% of costs and current labor rates." The contract required Owners to pay a \$1,000 deposit, plus a \$19,000 deposit to secure the cost of lumber and materials. It provided that "All special order items will require a fifty percent (50%) deposit . . . to secure special order and meet the deposit requirements of the vendors."

The contract also contained provisions relating to progress payments, insurance, arbitration, and the duties of both Contractor and Owners. Regarding progress payments, the contract provided in relevant part: "5.1 The Owner will make payments to the contractor pursuant to the draw schedule as determine[d] by Owner and Contractor schedule as work required by said schedule is satisfactorily completed. Owner shall make draw payments to contractor within FIVE (5) days after request by contractor. Should the owner fail to make payment, contractor may charge a penalty of 10% annually upon the unpaid amount until paid. [¶] 5.2 If payment is not received by the Contractor within five days after delivery of payment demand for work satisfactorily completed, contractor shall have the right to stop work or terminate the contract at his option."

Regarding Owners' duties, the contract provided: "7.1 The Owner shall communicate with subcontractors only through the Contractor. [¶] 7.2 The Owner will

not assume any liability or responsibility, nor have controls over or charge of construction means, methods, techniques, sequences, procedures, or for safety precautions and programs in connection with the project, since these are solely the Contractor's responsibility." According to Kelso the purpose of these provisions was to protect the scope of the project, to keep the work moving forward, and to keep Owners from interfering. In Kelso's experience, when an owner gets involved with the subcontractors, it prevents the job from moving forward and the general contractor loses control of the project.

### ***III. Course of Construction***

After the project began, Owners made several changes, including rotating the house so that it would face a different direction from that in the plans, adding a wine cellar, adding a radiant heating system over the concrete floor, replacing a spiral staircase with an elevator, and asking Contractor to order an eco-friendly lumber that was different from the lumber called for in the specifications.

Although he testified that he understood paragraphs 7.1 and 7.2 of the contract relating to restrictions on working and communicating directly with subcontractors, Silva insisted on using his own subcontractors and suppliers (hereafter sometimes jointly "vendors") for portions of the job. Silva paid those vendors directly, as opposed to running those expenses through Contractor. Silva testified that when Owners negotiated the contract with Contractor, he told Kelso he "wanted options" regarding vendors because he was concerned about getting the best price. He therefore asked Kelso to obtain two to three bids from each type of subcontractor or supplier. Although not set forth in the written contract, Silva testified that Kelso agreed and said that was the way he did business.

As the project progressed, Owners engaged vendors directly for concrete, windows, plumbing, and lumber. Although Contractor retained Granite Construction to

supply the concrete for the foundation and subterranean walls, Silva Farms (Silva's father's business) had an account with Don Chapin (Chapin), so Silva hired Chapin to supply and pour the concrete. Silva also hired the concrete finishers, through Chapin, but arranged for Contractor to pay them in cash. Toward the end of the foundation work, both Chapin and Granite Construction provided concrete; Silva paid both vendors directly for those services.

Before completing the concrete work, Contractor needed to know the sizes and dimensions of the windows and glass doors to determine the proper placement of the stag bolts and hold downs for the foundation. Owners decided to use Pella Windows; therefore, Kelso and Owners met with Sally Tuttle of Pella Windows and chose the styles and sizes of windows. Tuttle prepared an initial bid for the chosen windows. But in March 2007, Owners purchased the windows directly from Pella Windows, through Direct Buy (a membership buying service), even though Contractor had worked with Owners to have the initial bid prepared by Tuttle. Owners subsequently asserted that Contractor was not entitled to profit and overhead based on the substantial cost of those windows.

Concerning plumbing, Contractor wanted to hire OCG Plumbing (OCG). But Silva did not want to hire OCG because he thought its hourly rate was too high and he did not want to pay the \$50,000 "retainer" required by OCG. Silva hired BG Plumbing instead.

After the concrete floors and walls were poured, Contractor started framing the lower level of the structure. Owners considered using an alternate, eco-friendly lumber for the second story and treating the lower level with CopperNate. After Contractor researched those options and discussed them with Owners, Owners decided to use the type of lumber specified in the plans ("number 2 or better"). Contractor arranged for two or three truckloads of number 2 lumber to be delivered to the jobsite. After the lumber was unloaded, however, Silva said it was unacceptable and not what he wanted, so Kelso

had the lumber removed from the jobsite. According to Kelso, this was the “straw that broke the camel’s back.” Contractor left the job in early April 2007.

#### ***IV. Funding & Payment Problems***

After the contract was signed, Kelso learned that Owners had obtained a construction loan from Pinnacle Bank (Bank). Bank hired Construction Funds Control Services (CFCS) to oversee the funding process. CFCS reviewed Contractor’s draw requests to insure that they were supported by appropriate documentation (e.g., vendor invoices, time cards) and inspected the project to determine whether the work had been completed. After CFCS approved a draw request, Bank sent the money to Owners and Owners paid Contractor. The funding process usually took a few days, but Kelso testified that Owners would not pay Contractor for three or more weeks. Sometimes, Silva held up the process by refusing to sign draw requests.

Concerning the amount of the fee to be paid to Contractor, Kelso testified that his “coordination fee” (profit and overhead) was to be based on all “time and materials . . . encompassing . . . the whole project” and that it included amounts Silva paid directly to the vendors he had hired. Contractor contends that Silva agreed with this interpretation of the contract. On March 8, 2007, for example, Contractor’s bookkeeper, Dawn Kelso Cricchio, sent Silva an e-mail asking for copies of the invoices Silva had paid directly so that Contractor could keep track of project costs and calculate its profit and overhead. Silva acknowledged that their agreement was “time and materials . . . plus 15 % of the project cost (profit),” but he questioned a \$5,000 charge that Contractor had billed for Kelso’s time. Cricchio stated that she needed all of the invoices because “the contract is for all costs of the job regardless if you pay for them or if [Contractor] pays for them. . . . [B]ecause we are the General Contractor on record, we are exposing our license to lots of liability and additional insurance cost. Thus, we need all the numbers to correctly calculate the true time and materials job costs to date.” Silva asked Cricchio to explain

why he “should pay 15% profit for materials, before [he paid] for the materials themselves.” Silva stated that he was “not disputing the material to the job. [Contractor] gets a profit of 15% off of these and others that are incurring . . . .” Silva agreed to send a copy of the invoice, but stated that he would not authorize payment to Contractor until he had actually paid the vendor. “[T]hat is when the cost is realized on my books and [I] will pay 15% to Kelso along with that.” Furthermore, in an e-mail dated March 14, 2007, Silva agreed that Contractor was entitled to profit and overhead on the amounts billed by the concrete subcontractor.

At trial, Silva testified that he had agreed that Contractor was entitled to profit on the amounts he paid to the vendors he had hired directly because Kelso told him that is what he had to do. After Contractor left the job, Owners did not hire another general contractor; instead, Silva hired subcontractors directly and coordinated the work himself.

## **PROCEDURAL HISTORY**

### ***I. Pre-litigation Claims***

Shortly after Contractor left the job, Silva filed a criminal complaint with the Sheriff, in which he claimed Kelso had misappropriated funds for materials and converted funds. Ultimately, the district attorney decided not to prosecute Kelso. Silva also filed a complaint with the Contractor’s State Licensing Board (CSLB). The CSLB investigated and concluded the complaint was without merit.

### ***II. The Pleadings***

In August 2008, Contractor filed a complaint against Owners, which asserted five causes of action, including claims for breach of contract and malicious prosecution. Owners answered and asserted affirmative defenses that Contractor’s damages “are more

than offset” by Owners’ claims and that the allegations of the complaint were subject to “contractual binding arbitration.”

During a two-day bench trial, the court granted Owners’ motion in limine to dismiss the malicious prosecution claim; the case was tried on the breach of contract claim.<sup>2</sup>

### ***III. Argument and Evidence at Trial***

At trial, Contractor claimed damages totaling \$74,094.30. Contractor relied primarily on a spreadsheet prepared by Cricchio (Exhibit 11), which set forth the expenses of the job, amounts Contractor claimed as profit and overhead, payments made by Owners, and other credits. The expenses included bills for the time Kelso and Cricchio spent helping Owners obtain permits before the contract was signed, amounts paid for permits, as well as amounts paid to vendors (including those Owners paid directly) and to Contractor’s employees for labor. Contractor’s evidence included invoices, time cards, copies of checks, and other documents that supported the entries on Exhibit 11. The majority of that evidence was contained in Contractor’s Exhibit 10; Owners’ exhibits included documents that supported the claim.

Owners argued that under the terms of the contract, Contractor was not entitled to profit and overhead on the items Owners purchased directly. They also challenged other entries on Contractor’s spreadsheet, arguing that they were not supported by back-up documents and that the spreadsheet was incomplete, inaccurate, and contained mathematical errors. They asserted that Contractor was not entitled to bill for the time

---

<sup>2</sup> Contractor originally named Bank as a defendant, but the causes of action against Bank were dismissed prior to trial. Contractor’s complaint also alleged tortious interference with contract. In their trial brief, Owners argued that the allegations of the complaint did not properly plead a cause of action for tortious interference with contract and that there was no evidence to support the claim. It appears the trial court did not award any damages on that theory.

Kelso spent obtaining permits before signing the contract and that some of Contractor's work was defective. Finally, they argued that their claims offset any amounts due Contractor and urged the court to enter a defense verdict.

#### ***IV. Court's Ruling, Statement of Decision, and Judgment***

In September 2010, the court issued a written ruling. The court used the \$74,094.30 claimed by Contractor as a starting point and disallowed three components of the claim. The court held: "A portion of Plaintiff's claim is for time spent personally by Duke Kelso in securing initial permits. Defendants object to this because they were incurred before a contract was entered into and there was no other separate understanding that Defendants would be so charged. Rather, Defendants were led to believe Plaintiff was taking on this role as an inducement to ultimately be awarded the contract. The Court finds Defendants' understanding in this regard to be reasonable, and there being no convincing evidence of an agreement to pay for these services, they are not recoverable. That claim is disallowed in the amount of \$6,800." The court also disallowed Contractor's "claim for \$5,000 on invoice #830" and the "\$10,000 permit fees reflected in invoice #913." Altogether, the court deducted \$21,800 for these items and awarded Contractor \$52,294.30. The trial court also found against Owners on their construction defects claim.<sup>3</sup>

Owners filed a timely request for a statement of decision, which posed seven questions about the court's ruling. In response, the court filed a proposed statement of decision that added the following to its ruling: "The costs and profits billed to [Owners], with the exception of those disallowed by the Court, are found to have been appropriate under the terms of the contract, and were sufficiently described in the billings to inform [Owners] as to their bases. In addition, [Owners'] requests for clarification from

---

<sup>3</sup> Owners do not challenge that ruling on appeal.

[Contractor] and his office were satisfactorily responded to by the personnel in his office, whom the court found to be credible. Their explanations of the records kept for the project (see [Owners'] exhibits) substantiated those parts of the claim upheld by the court. [¶] Regarding the contested trial issues presented for adjudication, the court finds that [Contractor] acted within the standards of fair dealing required under a cost-plus contract.”

Owners filed written objections to the court's proposed statement of decision. Essentially, they objected that the proposed statement of decision did not adequately address their questions. The court issued a final statement of decision that responded to each of Owners' questions by stating: “the court rendered its decision as stated below and based its decision on the facts and legal basis stated below.” The court then repeated the language from the proposed statement of decision and awarded Contractor \$52,294.30.

#### *V. Motions for Attorney Fees*

Contractor subsequently filed two motions for attorney fees. Before the court issued its proposed statement of decision, there was a change in Contractor's counsel, with attorney Leigh Rodriguez substituting as counsel of record for attorney Kathleen Mahan, who had handled the case through trial. At the time of the substitution of attorneys in December 2010, Mahan filed a motion for attorney fees, claiming \$50,645 in fees on behalf of Contractor. Mahan subsequently withdrew that motion as premature.

In April 2011, after the court issued its statement of decision, Rodriguez filed another motion for attorney fees, requesting both the fees claimed by Mahan and his own fees of \$6,625 for past work done, plus \$375 for future work related to the motion for attorney fees.

Owners opposed the motions for attorney fees, arguing that Contractor was not entitled to fees because the contract required the parties to resolve any disputes by

binding arbitration, that the fees must be allocated between contract and non-contract claims, and that the fees requested were unreasonable.

The court granted Contractor's motions for attorney fees, awarding Mahan \$47,685 in fees and Rodriguez \$5,500 in fees.

Owners appeal both the judgment and the post-judgment order awarding attorney fees.

## DISCUSSION

### *I. Profit and Overhead Based on Amounts Owners Paid Directly to Vendors*

Owners contend the trial court erred as a matter of law when it awarded Contractor profit and overhead on costs it "did not incur." Owners assert that Contractor was only entitled to profit and overhead on costs Contractor paid and not those costs that Owners paid directly. This contention is based on the following amounts Owners paid to the enumerated subcontractors: (1) \$2,849.51 to Granite Construction for rock,<sup>4</sup> (2) \$29,439.33 to Chapin, (3) \$10,675 to BG Plumbing, and (4) \$76,164.23 to Direct Buy for the Pella Windows, for a total of \$119,128.07. Fifteen percent profit and overhead on \$119,128.07 is \$17,869.21. Contractor claimed profit and overhead based on these items in its spreadsheet and those amounts were not disallowed by the trial court.<sup>5</sup> Owners contend the judgment should be reduced by \$17,869.21.<sup>6</sup> We agree with the trial court

---

<sup>4</sup> According to Contractor's spreadsheet (Exhibit 11), Granite Construction billed Owners \$2,569.37 and Owners' paid Granite Construction \$1,795.11. As we explain under the subheading "Mathematical Errors," there was insufficient evidence to support those entries and the court's findings in those amounts. Owners' Exhibit OO indicates that the total amount billed by Granite Construction and the amount Owners paid for its services was \$2,849.51. For the purpose of our analysis, we shall use that figure.

<sup>5</sup> We have carefully reviewed Contractor's spreadsheet (Exhibit 11) and determined that Contractor's claim includes 15 percent profit and overhead on every item listed as an expense on the spreadsheet.

<sup>6</sup> Owners' brief uses the figure \$17,827.18. However, that amount is based on the erroneous figure (\$2,569.37) in Contractor's spreadsheet.

and conclude that under the terms of the contract and the circumstances of this case, Contractor was entitled to claim 15 percent profit and overhead on all costs, including the amounts Owners paid directly to the four vendors.

### **A. Nature of Cost Plus Contracts**

On most construction projects, the rights, duties and obligations of the owner and the general contractor are defined by a number of documents and drawings that are collectively referred to as the “contract documents.” (Gibbs & Hunt, Cal. Construction Law (17th ed. 2011) §§ 3.02, p. 168 (Cal. Construction Law).) The written contract in this case provides that the “contract documents consist of this agreement, general conditions, construction documents, specifications, allowances, finish schedules, construction draw schedule, all addenda issued prior to execution of this agreement and all change orders or modifications issued and agreed to by both parties.” But the only contract document in evidence was the written owner-contractor agreement. The dispute in this case focuses on the price provision in that agreement.

The four most common types of pricing provisions in owner-contractor construction contracts are: (1) lump sum or fixed fee; (2) unit price; (3) cost plus; and (4) cost plus with a guaranteed maximum. (Cal. Construction Law, *supra*, § 3.02[A][4], pp. 170-172; see also *Crowe v. Boyle* (1920) 184 Cal. 117, 130-139 (*Crowe*) [reviewing construction industry publications as of 1920 to determine the meaning of “cost-plus-fee plan with a guaranty” in city ordinance related to the construction of the Hetch Hetchy water project]; *Jones v. Pollock* (1950) 34 Cal.2d 863, 865 (*Jones*) [determining whether parties’ agreement was a cost plus contract or a cost plus contract with a guaranteed maximum]; *Anderson v. Pastorini* (1953) 117 Cal.App.2d 428, 429 [determining whether parties’ agreement was a cost plus or a fixed fee contract]; but see *Carrico v. City and County of San Francisco* (1960) 177 Cal.App.2d 97, 103-107 [identifying another type of pricing provision: “time and materials” contract at issue did not include general

contractor's profit and overhead, but did include amounts general contractor paid subcontractor for its profit and overhead].)

Generally, cost plus contracts call for the owner to pay the actual cost of the work plus a negotiated fee to the contractor. The negotiated fee may be either a fixed amount or some percentage of the cost of construction. (*Crowe, supra*, 184 Cal. at pp. 138, 144; Cal. Construction Law, *supra*, § 3.01[A][4][c]. p. 172; see e.g., *Jones, supra*, 34 Cal.2d at p. 864 [contractor's fee was 15 percent "of cost of construction"]; *Payne v. Cunningham* (1917) 175 Cal. 166, 168 [contractor's fee was 10 percent of "the total cost of the buildings"].)

As one of the authorities quoted in *Crowe* explained, in a lump sum or unit price contract, " 'the contractor takes the . . . specifications and estimates of the quantities, possibly checks the latter by his own computation, guesses at the interpretation which will be placed by the owner's representatives on the terms of the specifications and, from his knowledge of cost of materials and cost of labor, makes up a bid. In a lump sum contract the preliminary estimate of quantities is final, . . . . Any changes must be a matter of settlement between the owner and the contractor. The [contractor] takes all the gamble, and if conditions or quantities turn out more favorably than was anticipated, he wins; otherwise he loses, or is tempted to decrease the cost to himself by some method which generally means a poorer grade of work than that contemplated in the specifications. If conditions turn out much worse than anticipated, [the contractor] may forfeit whatever bond he put up and leave the owner and bondsmen to settle.' The tendency of such contracts, . . . 'is to remove responsibility from the owner and his representatives and place it on the contractor; also, all the gamble on the weather, foundations, changes in labor and material market, and every other unknown or unknowable factor is carefully unloaded on him. . . . In "cost plus" contracts, the owner accepts all risks, all costs, and receives the benefit of all favorable conditions; each job carries its own load only, without the addition of losses on other jobs and without the

percentage added by the contractor to offset possibly unfavorable conditions, ambiguous specifications, or captious owners.’ ” (*Crowe, supra*, 184 Cal. at pp. 134-135.) In *Crowe*, the court concluded that one of the essential features “of the cost-plus form of contract is the payment by the [owner] of the cost of the work.” (*Id.* at p. 144.) One of the advantages of cost plus contracts is that they “ ‘do away with the substantial sums usually added in lump-sum or unit-price contracts to cover’ ” uncertainties related to weather, shortages and changes in the cost of labor or materials, and the delayed deliveries of materials. (*Id.* at pp. 138-139.) One of the disadvantages of cost plus contracts is that it is difficult to determine the cost of construction in advance, which can upset budgets “where definite appropriations have been made or are required.” (*Id.* at p. 139.) There “are a great many variations of the cost-plus contract.”<sup>7</sup> (*Id.* at p. 138.)

## **B. Parties’ Contentions**

Owners argue that under the cost plus contract in this case, Contractor was only entitled to profit and overhead on project costs Contractor paid and not those paid directly by Owners because the contract defined costs as those “*incurred by the contractor* for materials, permits, and subcontractor services.” (Italics added.) Citing cases from out of

---

<sup>7</sup> According to the authority quoted in *Crowe*, the most common variations on the cost plus contract are: “ ‘1. Actual proved cost with labor and material furnished without restriction by the contractor—plus a fixed percentage or lump sum, to represent profit, supervision, financing, use of tools and plant, or any or all of these. [¶] 2. Actual proved cost of labor furnished by the contractor and with materials furnished by the owner, with a fixed percentage, or lump sum, as above. [¶] 3. Actual proved total cost for specified work plus a percentage for specified or unexpected extra or unforeseen work in connection with lump sum or unit price contracts. [¶] 4. Actual proved total cost to the contractor plus a sliding scale fee and upset maximum fee. [¶] 5. Actual proved cost to the contractor plus a fixed charge and fixed construction fee.’ ” (*Crowe, supra*, 184 Cal. at p. 138.) Although *Crowe* acknowledged variations in cost plus contracts, its description of those variations does not address the question presented here: when the contractor charges a fee based on a percentage of project costs, does the fee include a percentage of costs paid to vendors directly by the owner?

state, Owners argue that both the contract and case law define costs as only those incurred by Contractor.

Contractor argues that the out-of-state cases cited by Owners do not apply and that Owners fail to address what happens if extrinsic evidence is introduced to show how the parties interpreted the contract. Contractor relies on Kelso's testimony that Contractor's profit was to be based on all costs of the project. In addition, Contractor argues that the court may look to the acts of the parties to show what the contract means and that the court admitted extrinsic evidence that showed that the parties interpreted the contract to mean that Contractor's fee was based on all of the costs of the project, regardless of who paid them.

In reply, Owners argue that the contract was not ambiguous and, consequently, there was no need to resort to extrinsic evidence to interpret the contract.

Since the trial court allowed this portion of Contractor's claim for profit and overhead, it appears the court rejected Owners' interpretation of the contract. The trial court did not make any express findings regarding this question of contract interpretation, including whether the contract was ambiguous or whether the court relied on extrinsic evidence to interpret it. Since Owners' request for a statement of decision did not address this issue and their objections did not bring this omission to the court's attention, we may imply findings in support of the judgment. (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462 (*SFPP*).

### **C. Rules of Contract Interpretation and Standards of Review**

As in all contract cases, interpretation of the construction contract in this case is guided by the principle that it "must be so interpreted as to give effect to the mutual

intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.” (Civ. Code, § 1636.)<sup>8</sup>

A contract is to be interpreted as a whole, “so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.” (§ 1641.) Where there are several provisions to the contract, “such a construction is, if possible, to be adopted as will give effect to all.” (Code Civ. Proc., § 1858.)

As this court explained in *DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697 (*DVD Copy Control*), the “parties’ intent is ascertained from the language of the contract alone, ‘if the language is clear and explicit, and does not involve an absurdity.’ ([§§ 1636,] 1638.) Extrinsic evidence is admissible to explain the meaning of a contract if ‘the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.’ [Citation.] In order to determine whether the extrinsic evidence is admissible, the trial court first makes ‘a preliminary consideration of all credible evidence offered to prove the intention of the parties.’ [Citation.] ‘If the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, “is fairly susceptible of either one of the two interpretations contended for . . .” [citations], extrinsic evidence relevant to prove either of such meanings is admissible.’ ” (*DVD Copy Control, supra*, at p. 712, quoting *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37, 39-40 (*PG & E.*))

“The court must explain the contract ‘by reference to the circumstances under which it was made, and the matter to which it relates.’ (. . . § 1647.) Any uncertainty or ambiguity ‘must be interpreted in the sense in which the promisor . . . believed, at the time of making it, that the promisee . . . understood it.’ (*Id.*, § 1649.) The court may also look to the acts of the parties that show what they believed the contract to mean.

---

<sup>8</sup> All further statutory references are to the Civil Code, unless otherwise stated.

[Citation.] That is, ‘the construction given [a contract] by the acts and conduct of the parties with knowledge of its terms, and before any controversy has arisen as to its meaning, is admissible on the issue of the parties’ intent.’ (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851 . . . .) This rule is not limited to the joint conduct of the parties. ‘“The practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that other party had no knowledge of those words or acts when they occurred and did not concur in them. In the litigation that has ensued, one who is maintaining the same interpretation that is evidenced by the other party’s earlier words, and acts, can introduce them to support his contention” ’ ” (*DVD Copy Control, supra*, 176 Cal.App.4th at p. 712.)

The interpretation of a contract generally presents a question of law, which the appellate court reviews de novo. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) “ ‘The trial court’s determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. [Citation.] The trial court’s resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court’s resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence.’ ” (*DVD Copy Control, supra*, 176 Cal.App.4th at p. 713, quoting *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351.)

#### **D. Language of the Contract & Analysis**

We begin by reviewing the language of the contract. The provisions related to contract price are found in Article 4 of the contract. Paragraph 4.1 provides: “The construction contract shall be calculated on a cost plus coordination basis, with all labor, materials, permits and insurance figured as costs. Costs are defined as any costs incurred by the contractor for materials, permits and subcontract services. Labor will be billed at

current billing rates as set forth in 4.5. Construction coordination services shall be charged at 15% of costs and current labor rates.” Paragraphs 4.2 through 4.4 set forth terms regarding deposits<sup>9</sup> and paragraph 4.5 sets forth hourly labor rates for the job foreman, carpenters, and general laborers.

The first sentence of paragraph 4.1 provides that the contract price “shall be calculated on a cost plus coordination basis, with *all labor, materials, permits and insurance figured as costs.*” (Italics added.) This language supports Contractor’s interpretation that his fee for coordination services (which the parties refer to as profit and overhead) is based on “all” of the costs of the project, including those paid for by Owners.

But reading the language of paragraph 4.1 as a whole, as we must (§ 1641), casts doubt on that interpretation. The second sentence of paragraph 4.1 provides: “Costs are defined as any costs incurred by the contractor for materials, permits and subcontract services.” Arguably, this sentence limits the kinds of costs that may be considered in determining Contractor’s fee. It provides that costs must be *incurred*, rather than estimated or forecasted. (See e.g., *Crowe, supra*, 184 Cal. at pp. 134, 136, 145.) The types of costs listed in the second sentence differ from those in the first sentence. Both the first and second sentences include “materials” and “permits.” But unlike the first sentence, the second sentence does not list “labor” or “insurance” as costs.<sup>10</sup> The second sentence also adds “subcontract services” as a type of cost. Finally, the second sentence

---

<sup>9</sup> The contract required a \$1,000 deposit upon signing and a \$19,000 deposit to secure material costs. It also stated that special order items will require a deposit of 50 percent of the cost of the item.

<sup>10</sup> Owners do not contend that the second sentence limited the first sentence by excluding “labor” and “insurance” from the definition of “costs.” Any ambiguity between the first and second sentences about whether Contractor’s fee was to be based on his labor costs is resolved by the third and fourth sentences of paragraph 4.1, which provide: “Labor will be billed at current billing rates as set forth in 4.5. Construction coordination services shall be charged at 15% of costs and current labor rates.”

provides that the costs must be “incurred by the contractor.” Arguably, this phrase supports Owner’s interpretation of the contract that costs were limited to those costs incurred by Contractor and did not include costs that Owners paid directly.

But “incurring” a cost is not synonymous with “paying” for that cost. Webster’s Third New International Dictionary (1993) at page 1146 defines “incur” as “to become liable or subject to”; “to bring down upon oneself,” for example to incur a large debt or a penalty; or “to render liable or subject to.” (*Id.* at p. 1146, col. 3.) The same source defines “pay” as “to satisfy (someone) for services rendered or property delivered: discharge an obligation to” and “to give in return for goods or service.” (*Id.* at p. 1659, col. 1.) Roget’s II The New Thesaurus (3d ed. 1995) provides the following synonyms for “incur”: “to take upon oneself: assume, shoulder, tackle, take on, take over, undertake.” (*Id.* at p. 522, col.1.) Its definition of “pay” is similar to the dictionary definition cited above; synonyms for “pay” include “compensate, recompense, remunerate.” (*Id.* at p. 714, col. 2.) Arguably, by virtue of its role as general contractor, Contractor became liable for all vendor costs, even those paid directly by Owners.

In interpreting the price provision in the contract, including the phrase “incurred by the contractor,” we interpret the contract as a whole, “so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.” (§ 1641.) In its trial brief, Contractor urged the trial court to interpret the price provision in light of paragraph 7.1 of the contract, which provides: “The Owner shall communicate with subcontractors only through the Contractor.” In addition, paragraph 7.2 provides: “The Owner will not assume any liability or responsibility, nor have controls over or charge of construction means, methods, techniques, sequences, procedures, or for safety precautions and programs in connection with the project, since these are solely the Contractor’s responsibility.” These clauses of the contract provide that Contractor, not Owners, was responsible for securing, coordinating, and paying the subcontractors. Thus, the contract contemplated that Contractor would incur all of the costs of construction. Interpreting

paragraph 4.1 in light of the requirements of paragraphs 7.1 and 7.2 supports Contractor's interpretation of the contract, namely that its fee was to be based on all of the costs of the project, including those amounts that Owners paid directly to vendors.

Based on this analysis, we conclude that the language of the contract was "reasonably susceptible" to "either one of the two interpretations contended for." (*PG & E, supra*, 69 Cal.2d at pp. 37, 40.) Consequently, extrinsic evidence relevant to prove either meaning was admissible. (*Ibid.*; *DVD Copy Control, supra*, 176 Cal.App.4th at p. 712.) It is well settled that "when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court." (*Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 Cal.2d 751, 761; *Bohman v. Berg* (1960) 54 Cal.2d 787, 795 ["when a contract is ambiguous or uncertain the practical construction placed upon it by the parties before any controversy arises as to its meaning affords one of the most reliable means of determining the intent of the parties"]; *DVD Copy Control, supra*, at p. 712.) As the California Supreme Court stated more recently, "A party's conduct occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean. For this reason, evidence of such conduct, . . . , is admissible to resolve ambiguities in the contract's language." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 393.)

The court admitted extrinsic evidence on the question whether Contractor was entitled to profit and overhead on costs Owners paid directly to vendors, including a series of e-mails. Owners did not object to this evidence on the ground that it was

inadmissible because the contract was unambiguous,<sup>11</sup> and they do not challenge the admission of this evidence on appeal.

Contractor presented evidence that on March 7, 2007, almost four weeks before Contractor left the job, Silva sent Cricchio an e-mail questioning a \$5,000 “contractor’s fee” in the draw request. Cricchio responded that it was Kelso’s monthly salary.<sup>12</sup> The following day, Silva sent Cricchio an e-mail stating “our agreement is time and materials . . . plus 15% of the project cost (profit), not plus a \$5000.00 salary??” (Punctuation in original.) Notably, Silva’s statement did not limit Contractor’s profit and overhead to amounts that Contractor paid.

That same day, Cricchio sent Silva an e-mail stating that Contractor would make an adjustment for the \$5,000 fee in the next draw request. She also stated “we need ALL the bills for the concrete, the contract for the plumber, and all other costs to calculate our profit and overhead. The contract is for all costs of the job regardless if you pay for them or if [Contractor] pays for them. As you are aware, because we are the General Contractor on record, we are exposing our license to lots of liability and additional insurance cost. Thus, we need all the numbers to correctly calculate the true time and materials job costs to date.” Silva responded that he had over \$29,000 in invoices for concrete, but asked why he should “pay 15% profit for materials before he pays for the materials themselves.” He stated that he was “not disputing the material to the job. [Contractor] gets a profit of 15% off of these and others that are incurring,” for example Granite Construction, but stated that he would not pay Contractor’s profit and overhead

---

<sup>11</sup> Owners initially objected to the admission of the e-mails on other grounds, but later stipulated to their admission.

<sup>12</sup> At trial, Contractor claimed two separate fees for Kelso’s time: \$5,000 for June through October 2006, which the trial court disallowed, and \$7,080 for November 2006 through March 2007. The \$5,000 at issue in the e-mails appears to be the fee the trial court disallowed for time Kelso spent working on the permits before the parties signed the contract.

until he actually paid the vendors. “[T]hat is when the cost is realized on my books and [I] will pay 15% to Kelso along with that.” And six days later, in an e-mail dated March 14, 2007, Silva agreed once again that Contractor was entitled to profit and overhead on amounts billed by the concrete subcontractor.<sup>13</sup> These e-mails support the conclusion that weeks before Contractor left the job—and almost a year and a half before the litigation was filed—Owners agreed with Contractor’s interpretation of the contract that the parties intended that Contractor’s fee be based on all costs of the job, including those that Owners ended up paying directly.

In addition, adopting Owner’s interpretation of the contract would lead to an absurdity. In this case, there was substantial evidence that Contractor coordinated the work of the vendors that Owners paid directly. Although Silva provided heavy machinery—an operator, and laborers from his father’s ranch for the excavation of the pad and grading work at no cost to Owners or Contractor—Silva testified that the site preparation, excavation and grading were done under the direction of Contractor’s crew and the surveyor. Silva did not direct any of that work. Thus, Contractor directed the excavation work and incurred potential liability for that work. Similarly, although Owners selected and paid the concrete supplier directly, Owners did not coordinate that work. Silva testified that he did not order or schedule the concrete, that he told Kelso to pay the concrete finishers in cash, and that Contractor’s crew directed the concrete work.

In addition, Silva testified that Owners did not supervise the plumber’s work. And as part of the foundation work, Contractor needed to know the sizes and locations of the windows. Contractor and Owners met with Tuttle, who provided a preliminary bid for the windows. Kelso testified that he spent 10 to 20 hours working to obtain this

---

<sup>13</sup> Silva wrote: “[I] simply want to draw all of the funds for the materials, I have purchased, and the profit at the single draw from CFCS. [Y]our delaying the project delays the terms even further, as I want to pay the concrete all at once, plus your 15% profit. [C]oncrete, total billing thus far, is . . . just above \$29,000. [T]his figure multiplied by your profit,  $\$29,000 \times 0.15 = \$4,350.00$ .”

information. Months later, before Contractor left the job, Owners purchased the windows directly from Tuttle through Direct Buy.

With respect to the work from Granite Construction, the record does not indicate precisely how the rock was used. There was evidence that it was used in the construction of the foundation and concrete walls in the basement and that Contractor paid for some of it. But there was no evidence that Owners directed or coordinated the work involving the rock.

Although there was conflicting evidence regarding who coordinated some of the work described above, substantial evidence supports an implied finding that Owners reaped the benefit of Contractor's coordination services related to materials and subcontract services they paid for directly.

Pursuant to the contract, Contractor was to be paid on a "cost plus coordination basis" with its "[c]onstruction coordination services charged at 15% of costs" and labor. Substantial evidence supported the conclusion that it was Contractor, not Owners, who coordinated the work of the vendors that Owners paid directly. Yet under Owners' interpretation of the contract, Contractor would not be able to charge for its construction coordination services (profit and overhead) against that work. As we have noted, one of the characteristics of a cost plus construction contract is that it shifts all of the risk of the project from the contractor to the owner. (*Crowe, supra*, 184 Cal. at p. 135 ["the owner accepts all risks, all costs, and receives the benefit of all favorable conditions"].) If we interpret the contract as Owners suggest, an owner could circumvent the requirements of the contract and reduce the amount of the contractor's coordination fee by paying vendors directly, while reaping the benefit of the contractor's coordination services, thereby shifting the risk of the work back to the contractor.

The parties do not cite any California cases that address the issue presented here. Owners cite five out-of-state cases, none of which we find persuasive. In *Keever & Associates, Inc. v. Randall* (Wash.Ct.App. 2005) 119 P.3d 926 (*Keever*), a Washington

appellate court affirmed the trial court's finding that a general contractor "was not entitled to levy" his 10 percent fee in a cost plus contract on costs paid directly by the owner because those costs were not actual costs to the contractor. (*Id.* at p. 930.) The court did not analyze the language of the contract. It concluded instead that the contractor had not met its burden on appeal of providing reasoned argument and citations to the record and authority. (*Id.* at pp. 929-930.) In *Grothe v. Erickson* (Neb. 1953) 59 N.W.2d 368, 371 (*Grothe*), a case involving an oral cost plus contract, the Nebraska Supreme Court held that a contractor was not entitled to charge a profit on lumber purchased by the owner because the contractor incurred no financial liability in connection with the purchase. *Grothe* is distinguishable from this case because it involved an oral, not a written, contract and because the owner in *Grothe* purchased the lumber before the parties entered into their contract. (*Ibid.*) Although the other cases cited by Owners involve cost plus contracts, they do not address the question whether the contractor on a cost plus contract is entitled to profit and overhead on amounts paid directly by the owner to vendors. (*Master-Built Construction Co. v. Thorne* (2005) 802 N.Y.S.2d 713, *Continental Copper & Steel Industries v. Bloom* (Conn. 1953) 96 A.2d. 758, and *Kerner v. Keeney* (Ill. 1948) 78 N.E.2d 252.)

For these reasons, we conclude that under the terms of the contract, Contractor was entitled to profit and overhead on all costs incurred for the project, including amounts Owners paid directly to vendors. Consequently, the trial court did not err when it awarded Contractor profit and overhead on those amounts.

### **E. Modification of the Contract**

Even if we were to conclude that the contract unambiguously provides that Contractor is entitled to profit and overhead only on costs it paid and not the costs that Owners paid directly, another analysis supports the trial court's judgment. Prior to oral argument, we requested supplemental briefing from the parties on the questions of

whether the evidence supports implied findings that the parties modified the original written contract or otherwise waived the requirement that costs be “incurred by the contractor.”

The modification of a written contract is governed by section 1698, which provides: “(a) A contract in writing may be modified by a contract in writing. [¶] (b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties. [¶] (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions. [¶] (d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.” Assuming the contract unambiguously required that costs be paid for by Contractor before they may be used to calculate its profit and overhead, the evidence here supports a conclusion that the parties modified that requirement under subdivision (a) of section 1698 or waived it under subdivision (d) of that section.

Under subdivision (a) of section 1698, a “contract in writing may be modified by a contract in writing.” The written exchange of e-mails in this case may be construed as a writing modifying the contract requirement that costs be “incurred by the contractor.” In *Texas Co. v. Todd* (1937) 19 Cal.App.2d 174, 185, the parties disputed the amount of a discount to be applied to a certain grade of gasoline under a written contract to purchase gasoline. The court concluded that the parties’ telegrams and letters indicated that they recognized that there was a dispute and “compromised that dispute and modified the contract or enlarged its terms so as to cover the omission” and “settled the dispute regarding that feature of the contract. That compromise agreement merged in the contract and became a part of it. There is no doubt the law authorizes such a

modification or addition to a written executory contract by a written stipulation evidenced by the subsequent telegrams or letters.” (*Ibid.*) The e-mails in this case had the same effect as the telegrams and letters in *Texas Co. v. Todd*.

Furthermore, subdivision (d) of section 1698 provides “Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.” The evidence supports the conclusion that as the project progressed, the parties mutually waived the requirements in paragraph 4.1 that costs be “incurred by the contractor” and in paragraphs 7.1 and 7.2 that Owners not have any contact with the vendors or control over methods of construction. Owners insisted on using their own subcontractors and material suppliers and paying some of the vendors directly. Although Contractor argued at trial that Owners had breached paragraphs 7.1 and 7.2 of the contract, there was evidence that Contractor allowed Owners to communicate with and contract with the subcontractors. For example, although Contractor planned to hire Granite Construction to supply the concrete, it allowed Owners to obtain a bid from Chapin and ultimately agreed to hire Chapin to provide the concrete. There was a similar agreement regarding BG Plumbing. And in the e-mail exchange between Cricchio and Silva on March 8, 2007, after describing materials Contractor had purchased from Granite Construction, Cricchio stated, “If you would like to open an account at [G]ranite under your name and have everything put on that account and billed to you, we can do that!” In addition, in our view, Contractor’s agreement to allow Owners to contract with some of the vendors directly to save costs was sufficient consideration for an agreement by Owners to waive the contract requirement that costs be “incurred by the contractor.”

*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020 (*Diamond*), overruled on another point as stated in *Bullock v. Philip Morris USA, Inc.*, 198 Cal. App. 4th 543, 565, is instructive. *Diamond* arose out of a breach of contract

claim between an employee leasing company and its client (Diamond). The *Diamond* court explained, “The parties mutually dispensed with the subject requirements of the contract by quid pro quo conduct antithetical to the written terms of the contract, i.e., [the leasing company] dispensed with the requirements regarding prehiring paperwork and approval, and in turn Diamond performed the specified duties with regard to new hires that were [the leasing company’s] obligation under the contract. No additional consideration was needed.” (*Id.* at pp. 1038-1039.) The court stated that the parties “not only abandoned or ignored the provisions dealing with the processing of new employees, but, postagreement, substituted a course of conduct wholly incompatible with those provisions. This is a textbook case of modification by conduct. As our Supreme Court has held, where the subsequent conduct of parties is inconsistent with and clearly contrary to provisions of the written agreement, the parties’ modification setting aside the written provisions will be implied. (*Garrison v. Edward Brown & Sons* (1944) 25 Cal.2d 473, 479 . . . [‘Before a contract modifying a written contract can be implied, the conduct of the parties according to the findings of the trial court must be inconsistent with the written contract so as to warrant the conclusion that the parties intended to modify the written contract’]; [citation].)” (*Diamond*, at p. 1038.)

Although this case does not support a finding of an oral modification of the contract under section 1698, subdivision (c), because the contract was subject to the statute of frauds,<sup>14</sup> nothing in section 1698 precluded the court from finding a mutual

---

<sup>14</sup> Arguably, the parties’ conduct may be construed as an oral modification of the contract under subdivision (c) of section 1698. Section 1698, subdivision (c) allows oral modifications under three conditions: first, the oral modification must be supported by a new consideration; second, the written agreement must not have a clause that expressly prohibits oral modifications; and third, the statute of frauds must be satisfied if the contract is within its provisions. (§ 1698, subd. (c).) Regarding the first requirement, the e-mails support the conclusion that Owners waived the contract requirement that costs be incurred by the contractor before Contractor could claim profit and overhead on those costs. The consideration for that modification was Contractor’s agreement to waive the requirements of paragraphs 7.1 and 7.2 of the contract, which prohibited Owners from

waiver of the provisions of paragraphs 4.1, 7.1 and 7.2 of the contract based on the parties' course of conduct and the e-mails. To this end, we note that Contractor stated in its trial brief that one of Owners' defenses was that they hired subcontractors "by mutual agreement." In our view, the evidence supports a finding of mutual waiver of the contract provisions enumerated above. As we have noted, since the court did not make express findings on the contract interpretation question or the issue of waiver and Owners did not raise these points in their request for statement of decision or objections to the court's statement of decision, we may imply such findings in support of the judgment. (*SFPP, supra*, 121 Cal.App.4th at p. 462.)

## ***II. Sufficiency of the Evidence***

Owners challenge the sufficiency of the evidence to support a number of items the trial court awarded Contractor. After describing our standard of review, we shall address each of Owners' points.

### **A. Standard of Review**

The trial court's factual findings are subject to limited review on appeal and will not be disturbed if supported by substantial evidence. (*Williams v. Saunders* (1997) 55

---

communicating with the subcontractors. As for the second requirement, although the contract required that change orders, which it defined as "any change in the original plans and specifications," must be agreed upon in writing and signed by both parties, it did not prohibit oral modifications of the terms of the written contract. As for the third requirement, the contract was subject to the statute of frauds since the parties contemplated that it would take approximately 18 months to complete the construction (§ 1624, subd. (a)(1)). We note that Owners did not assert a statute of frauds defense in their answer or at trial. But since Contractor did not expressly assert an oral modification theory below, we are reluctant to assume that Owners have waived the statute of frauds requirement under section 1698, subdivision (c). (See *Healy v. Brewster* (1963) 59 Cal.2d 455, 464.) We, therefore, conclude that the record does not support an oral modification under section 1698, subdivision (c).

Cal.App.4th 1158, 1162.) “When a trial court’s factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination.” (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, original emphasis omitted.) As long as there is substantial evidence, the appellate court must affirm, even if the reviewing justices personally would have ruled differently if they had presided over the proceedings below and even if other substantial evidence would have supported a different result. (*Id.* at p. 874.) An appellate court is “not in a position to weigh any conflicts or disputes in the evidence. Even if different inferences can reasonably be drawn from the evidence, [the appellate court] may not substitute [its] own inferences or deductions for those of the trial court. [Its] authority begins and ends with a determination of whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, which will support the judgment. [Citations.] Therefore, we must consider all of the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference from the evidence tending to establish the correctness of the trial court’s decision, and resolving conflicts in support of the trial court’s decision.” (*Estate of Beard* (1999) 71 Cal.App.4th 753, 778-779.)

## **B. Amounts Charged for Labor**

Owners contend that there was insufficient evidence to support amounts awarded for some of Dave Whent’s and Victor Jimenez’s labor. Regarding Whent, Owners challenge the awards of \$1,560 for work done from January 29 through February 5, 2007, and \$3,542 for March 30 through April 3, 2007. Regarding Jimenez, Owners challenge the award of \$1,440 for work done from December 7 through December 13, 2006.

There is no merit to this contention. Contractor’s invoices identified Whent as the job foreman and Jimenez as a laborer. Whent’s time was billed at \$65 per hour and

Jimenez's time was billed at \$30 per hour in accordance with labor rates in the contract. Contrary to Owners' assertion that Contractor "produced no time sheets for this labor," Exhibit 12 contained copies of the employees' time cards for the periods at issue. The numbers of hours recorded on the time cards support the amounts claimed.

Owners also challenge amounts awarded for Telesforo Garcia's labor. They contend there is no evidence supporting "four entries for wages totaling \$2,240" on page 3 of Exhibit 11. Contractor's invoices describe Garcia as a carpenter; pursuant to the contract, his work was charged at \$45 per hour. Contrary to Owners' assertions, Contractor's Exhibit 10 contains time cards for three of the four pay periods at issue. The only period for which there was no time card was January 11 through January 24, 2007. But, in addition to the time cards, Contractor's invoices itemized all of the labor claimed. According to invoice no. 912, Garcia worked 88 hours between January 11 and January 24, 2007. The trial judge found Contractor's staff credible and reasonably concluded that invoice no. 912 sufficiently described the work done and the amount claimed, even though there was no time card. For these reasons, we reject Owners' contention that there was insufficient evidence to support the amount awarded for Garcia's labor.

### **C. Rasmussen Land Surveying**

Owners challenge the award of \$1,131.75 for amounts Contractor paid to Rasmussen Land Surveying (Rasmussen) on Rasmussen's invoice no. 5482, arguing that there was no receipt or invoice from Rasmussen to support the claim. Owners did raise this claim at trial.

Generally, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.)

On cross examination, Cricchio agreed that the invoice was not in Contractor's Exhibit 10, but testified that she had "turned it in. It has been presented." Contractor's claim included other invoices from Rasmussen with different invoice numbers, which are not challenged on appeal. Cricchio testified that the entries on Contractor's spreadsheet were accurate and included the vendors' invoice numbers and the trial court found her credible. Although Contractor's evidence did not include a copy of the Rasmussen's invoice no. 5482,<sup>15</sup> Contractor did itemize this expense on its spreadsheet and there was no evidence that this cost was not incurred or that the amount claimed was incorrect or duplicative. In our view, there was substantial evidence that supported the court's award of this line item.

#### **D. Cost of Generator**

Without much argument or any citation to legal authority, Owners assert that the trial court erred when it awarded \$3,200 plus profit of \$480 (15 percent of \$3,200) for the cost of a generator for eight weeks, "despite the fact that Kelso agreed not to charge for it." "In cost plus contracts, as a general rule, . . . hauling, storage and operating expenses resulting from the use of equipment are reimbursable expenses and not overhead." (*Vowels v. Witt* (1957) 149 Cal.App.2d 257, 263.)

Substantial evidence supports the award of this line item. Cricchio testified that whenever Silva complained about items on Contractor's billing, Contractor agreed to temporarily remove those items from the bill and "deal with [them] towards the end of the last billing." She explained, for example, that Silva complained about being billed for the generator and "kept saying he was going to bring his own generator." To move forward on the project, she agreed not to bill for it "until the generator was replaced." She testified that she subsequently billed for the generator in the final claim (Exhibit 11)

---

<sup>15</sup> It appears five pages are missing from Exhibit 10.

because the generator was on site for 12 weeks.<sup>16</sup> Thus, substantial evidence supports the court's award of this line item.

### **E. Credit for Lumber Deposit**

Owners argue that the trial court erred in not giving them a credit for \$19,000 they paid as a lumber deposit. At trial, Kelso testified that Owners paid the lumber deposit. When asked to produce documentary proof, he stated that several payments were made to Hayward Lumber. He also stated, "This is the first time this question came up, and we would have to go through bank statements and find out when it was taken care of."

Although the contract required Owners to deposit \$1,000 at signing, plus \$19,000 toward materials, Owners' Exhibits I & J indicate that Contractor only billed Owners for a portion of the deposit (\$4,900 per Contractor's invoice no. 894) and that Owners paid that amount in December 2006. Thus, Owners' own exhibits do not support their contention that they are entitled to a credit of \$19,000 for the deposit.

But, rather than list this as a deposit, Contractor's spreadsheet lists this item as an expense for permits. The spreadsheet also credits Owners for the \$4,900. However, since no actual permit expense was incurred, Owners are entitled to a credit for \$4,900 against the total amount awarded contractor. As we shall explain in part II. J below, the trial court did just that when it disallowed \$6,800 of permit costs.

In summary, the evidence is insufficient to support Owners' assertion that they are entitled to a credit for a lumber deposit of \$19,000 and the court has already credited Owners for the \$4,900 they paid as a deposit.

---

<sup>16</sup> Contractor's Exhibit 11 contained two separate line items for the generator. Contractor billed \$1,600 for use of the generator for four weeks as part of its invoice no. 912 and \$3,200 for use of the generator for eight weeks as part of its final bill, for a total of 12 weeks. On appeal, Owners challenge only the second charge.

## **F. Failure to Credit Owners for Prior Credit Memo**

Owners contend that the court erred when it failed to give them a \$10,625.39 credit in Contractor's invoice no. 951. The amount credited was primarily profit and overhead attributable to the windows purchased from Direct Buy. Cricchio testified that as part of their negotiations with Owners and Bank, Contractor issued a credit on invoice no. 951 for the disputed profit and overhead on the windows. This was done so Contractor could receive payment for other undisputed items "because we were trying to resolve the issues to get funded, but we are still entitled to that 15 percent profit and overhead." Thus, there was evidence that by issuing the credit, Contractor did not waive its right to claim that amount later. Since the trial court correctly concluded that Contractor was entitled to claim profit and overhead on amounts Owners paid directly to vendors, including Direct Buy, it did not err when it failed to give Owners the \$10,625.39 credit on invoice no. 951.

## **G. Invoice No. 830**

Owners argue that there is insufficient evidence to support costs claimed on Contractor's invoice no. 830. During the construction, Contractor presented several invoices to CFCS and Owners for payment. But at trial, Contractor did not rely on those invoices to present its claim. Instead, Cricchio prepared a single spreadsheet setting forth all of the costs, profit and overhead, payments, and credits related to the job. The spreadsheet did contain references to invoice numbers that correlated with entries on the spreadsheet. Some of the invoices were in Contractor's documentation supporting the entries on the spreadsheet. Cricchio testified that the only entry on Contractor's spreadsheet that correlated with invoice no. 830 was the \$5,000 claim for 62.5 hours of Kelso's time related to the permits, which the trial court disallowed. Owners' brief contains several complaints related to invoice no. 830. Since Contractor's only claim

related to invoice no. 830 was disallowed by the trial court, Owners fail to demonstrate any further error related to invoice no. 830.

#### **H. Amount Awarded for Work by Duke Kelso**

Owners challenge \$8,142 awarded to Contractor for Kelso's time over a five-month period. This claim is based on 88.5 hours at \$80 per hour, which equals \$7,080, plus \$1,062 for profit and overhead based on that time (15 percent of \$7,080 is \$1,062; \$7,080 plus \$1,062 is \$8,142). Owners contend that the single time card offered in evidence (Exhibit 15) was insufficient to support the claim. They assert that the labor rates in the contract did not include Kelso's time at \$80 per hour and that, as a matter of law, Contractor could not charge for Kelso's time absent an agreement to do so. Contractor does not respond to these contentions. We agree that the evidence was insufficient to support the award of \$8,142 for this line item.

As the court explained in *Keever*, it is a generally accepted that administrative supervision time is not covered under a cost-plus contract. (*Keever, supra*, 119 P.3d at p. 929.) "As stated in one treatise: . . . [I]n a cost-plus contract, the contractor cannot charge for mere administrative supervision in the absence of an agreement with the other party. The rationale for disallowing such supervision charges is that the percentage or plus that is added to the actual costs is contemplated to be compensation for the administrative supervision." (*Ibid*, citing 17A Am.Jur.2d (2004) Contracts, §495, pp. 464-65; 13 Am.Jur.2d (2009) Building & Construction Contracts, §19, pp. 26-27 ["Under a cost plus contract, the contractor is not entitled, in addition to the percentage called for in the contract, to charge for . . . general or overhead expenses, such as salaries, telephone service, and office supplies; [or] for his or her own time in superintending the work . . ."]; *Ellis Millwork, Inc. v. Frees, Inc.* (La.Ct.App. 1986) 493 So.2d 696, 698 [same]; & *Wymard v. McCloskey & Co.* (3d Cir. 1965) 342 F.2d 495, 499 (*Wymard*) [under Pennsylvania and Maryland law, cost-plus contact does not impose an obligation

to pay anything for general overhead, including supervision].) Although the written contract contained a provision regarding labor rates to be charged for Contractor's foreman, lead carpenters, carpenters, and laborers, which ranged from \$30 to \$65 per hour, it did not include a labor rate for Kelso, as superintendent or principal of the corporation, at \$80 per hour.

The evidence in support of this claim includes a single time card (Exhibit 15), which stated that Kelso worked 88.5 hours during the period November 1, 2006, through March 21, 2007, and that the work encompassed radiant heat, permits, lumber, trailer, and windows. The evidence also included testimony regarding 12 pages of time cards (Exhibit 16) documenting time Kelso spent "on things above and beyond the contract." But Exhibit 16 was not placed into evidence.

Kelso and Cricchio testified that Kelso and Silva had an oral agreement that Silva would pay him for his time "outside the contract." According to Cricchio, the time billed in Exhibit 16 included "different things that held up—had nothing to do with the actual work on the house," including permits, the eco-friendly lumber, the windows, meetings with Bank and others to obtain funds due, and obtaining permits for another site Owners wanted to develop. According to Kelso, that work included: (1) obtaining permits; (2) researching the elevator, the eco-friendly lumber, and the use of CopperNate on the lower level framing; and (3) extra work related to rotating the house to face another direction. Although Kelso and Cricchio characterized this work as outside the contract, their descriptions of the work indicate that, except for the permit work related to another parcel, it all related to the construction of the Silva residence. Furthermore, the complaint did not allege a breach of oral contract cause of action to support this claim.

Even if Contractor had included a breach of oral contract cause of action in the complaint, most of the work relating to this line item appears to involve changes in the plans, which would be subject to change orders. Regarding change orders, the contract provided in relevant part: "A Change Order is any change to the original plans and/or

specifications. All change orders need to be agreed upon in writing, including cost, additional time considerations and signed by both parties. 50% of the cost of each change order will be paid prior to the change, with the final 50% paid upon completion of the change order. A 12% fee shall be added to all change orders and overages in excess of initial allowances.” Contractor did not present any evidence that the parties entered into any written change orders related to the changes to the plans covered by this work as required by the contract.

In summary, while there was some evidence of an oral agreement to pay Kelso for his time “outside the contract,” there was no evidence of an agreement to pay Contractor for Kelso’s time administering the contract and supervising work related to the construction of the Silva residence. Since Exhibit 16 was not in evidence, there is no evidence of the amount of time attributable to the one task that was actually outside the contract (obtaining permits for another parcel). For these reasons, we conclude that there was insufficient evidence to support the award of \$8,142 for Kelso’s work on the project and will deduct that amount from the judgment.

#### **I. Amount Awarded as Profit and Overhead for Office Administration**

The court’s award included \$640 for 12 hours of Cricchio’s time and 7 hours of Lisa Piacentino’s time for “Administrative/Accounting Labor,” plus \$96 for profit and overhead based on that cost (15% of \$640 = \$96). Owners do not challenge the \$640 awarded for administrative and accounting costs, and the propriety of that award is not before us. But Owners do challenge the \$96 awarded for profit and overhead based on that time. Citing out-of-state cases, Owners argue that “[s]uch labor is not a cost upon which profit can be charged.”

Cricchio and Kelso testified that the Silva job required more accounting time than usual, to attend meetings with Owners and Bank to obtain funds that were not distributed on time.

The out-of-state cases that Owners rely on recite the rule that in a cost plus contract, the contractor is not entitled to charge for general overhead expense in addition to the profit and overhead percentage authorized by the contract. (*Nolop v. Spettel* (Wis. 1954) 64 N.W.2d 859, 864 (*Nolop*); *Don Nelson Construction Co. v. Landen* (Neb. 1977) 253 N.W.2d 849, 852 (*Nelson*); *Grothe, supra*, 59 N.W.2d at p. 371; *Keever, supra*, 119 P.3d at p. 928; *Wymard, supra*, 342 F.2d 495, 499 [applying Pennsylvania & Maryland law]; see also 13 Am.Jur.2d, *supra*, Building & Construction Contracts, §19, pp. 26-27 [under a cost plus contract, the contractor is not entitled, in addition to the percentage called for in the contract, to charge for general or overhead expenses, such as salaries, telephone service, and office supplies].) But none of the cases Owners cite apply the rule in the situation presented here. (*Nolop, supra*, at p. 864 [unproductive apprentice labor]; *Nelson, supra*, at p. 852 [no agreement to include cost of land as a job cost]; *Grothe, supra*, at p. 371 [inadequate factual showing of accounting time claimed]; *Keever, supra*, at p. 928 [contractor not entitled to recover for principal's time where there was no evidence his time was a cost to the corporation]; *Wymard, supra*, at p. 499 [oral cost plus contract does not require owner to pay for general overhead].) In this case, Contractor did not charge for general overhead or general accounting expenses related to administering the contract. It charged for extraordinary accounting expenses associated with obtaining payment after Owners breached by delaying payment. As we have noted, Owners do not challenge the \$640 Contractor charged for these accounting expenses; instead, they challenge the 15 percent profit and overhead claim attributable to those expenses. In our view, since the \$640 is itself a form of overhead, Owners were not entitled to charge additional profit and overhead on that amount. We shall therefore reduce the judgment by \$96.

## **J. Alleged Overpayment on Permits**

Owners contend the court erred when it failed to credit them for an overpayment of \$16,807.90 on permits.

Contractor's spreadsheet contained four entries for permit expenses in the following amounts: \$7,106.12 + \$21,020.26 + \$4,900 + \$10,000, for a total of \$43,026.38. The spreadsheet also indicated that each of these amounts had been paid by Owners and credited them for the payments.

Owners contend that the correct amount for permit costs was \$26,218.48 and that the court should have credited them for \$16,807.90, the difference between the \$43,026.38 claimed as permit costs and \$26,218.48. As we shall explain, that is exactly what the trial court did when it disallowed the "\$10,000 permit fees reflected in invoice #913" and \$6,800 of Contractor's permit-related claim.

As Owners note, the total amount of permit fees for which there were supporting documents was \$26,218.48. (See Contractor's invoice no. 912 [Exhibit 10, p. 1] and pages 5-11 of Exhibit 10.) The trial court disallowed the \$10,000 cost associated with Contractor's invoice no. 913. That line item, which Contractor claimed as a permit expense, was actually a deposit toward permit fees (see Owners' Exhibit R) and not a cost. The trial court was therefore correct to disallow this amount. The court disallowed another \$6,800 in costs related to permits, explaining that it reflected Contractor's time related to the permit process. The \$6,800 included amounts billed for Kelso's time, Cricchio's time, and the \$4,900 material deposit.

In summary, the court took the total amount claimed as permit-related expenses (\$43,026.38), calculated the actual amount paid as permit fees (\$26,218.48), rounded the difference to \$16,800, and disallowed that portion of the claim. Substantial evidence supports the court's treatment of the permit-related claims. Since the court already disallowed \$16,800, we reject Owner's contention that they are entitled to a \$16,807.90

credit against permit costs. But since we are modifying the award in other respects, we shall deduct another \$7.90 to allow for the portion of the permit-related expenses that the court rounded off.

#### **K. Profit Awarded on Items That Were Disallowed**

In determining its award, the court disallowed three items totaling \$21,800. Owners contend that the trial court erred because although it disallowed these items, it did not reduce the amount Contractor claimed as profit and overhead on these items. We agree with this contention.

Contractor's spreadsheet contains multiple entries that are described as "Profit/Overhead 15%." We have reviewed the spreadsheet carefully and checked Cricchio's calculations and determined that Contractor claimed 15 percent profit and overhead on every entry listed as a cost on the spreadsheet.

Since the court disallowed \$21,800 of the costs claimed, the evidence no longer supports a portion of the amount Contractor claimed as profit and overhead. The trial court should have adjusted the amount awarded as profit and overhead to reflect its reduction of these costs. Since the amount is easily ascertainable by mathematical calculation (15 percent of \$21,800 is \$3,270), we shall modify the judgment to reflect a \$3,270 reduction in the amount awarded for profit and overhead.

#### **L. Mathematical Errors**

Owners argue that the award is not supported by substantial evidence because there are three mathematical errors totaling \$8,248.21 in Contractor's spreadsheet.

First, Owners challenge the first entry for profit and overhead on Contractor's spreadsheet in the amount of \$30,700.99 as a mathematical error. They argue that the costs related to this entry total \$161,646.90 and that 15 percent of \$161,646.90 is \$24,247.04, not \$30,700.99. They assert that the judgment must therefore be adjusted by

\$6,453.95 to correct this error. But the profit and overhead entry at issue is based on both costs of \$161,646.90 in Contractor's invoice no. 912 and the amounts claimed for the permits (\$43,026.38). When the permit costs are factored in (i.e.,  $\$161,646.90 + \$43,026.38 = \$204,673.28$ ), \$30,700.99 is a correct statement of the profit and overhead claim (15 percent of  $\$204,673.28 = \$30,700.99$ ). Since we are modifying the judgment by deducting the profit and overhead attributable to the permit-related costs that the court disallowed, no further adjustment is required. We therefore reject Owners' contention that Contractor's spreadsheet contains a \$6,453.95 mathematical error.

Second, Owners assert that there were mathematical errors related to the amount Owners paid directly to Granite Construction. As noted previously, we agree there were errors in the spreadsheet, but not in the amounts posited by Owners. According to Contractor's spreadsheet, Granite Construction billed Owners \$2,569.37 and Owners' paid Granite Construction \$1,795.11. But there was insufficient evidence in the record to support those figures. The supporting documents in Exhibit 10 indicate that Cricchio made a mathematical error calculating the amount billed by Granite Construction and included one invoice for which Owners received a credit. In addition, Exhibit 10 does not contain any evidence that Owners paid \$1,795.11 toward this bill. However, Owners' Exhibit OO fills the evidentiary gap. It indicates that there were additional invoices and that the total amount billed and paid by Owners for Granite Construction's services was \$2,849.51. Since we are modifying the judgment, we will order an adjustment to correct for these mathematical errors and reduce the judgment by \$732.24.<sup>17</sup>

---

<sup>17</sup> The amount of Contractor's cost claim for Granite Construction is increased by \$280.14 (the difference between the \$2,849.51 on the invoices and \$2,569.37 on Exhibit 11) plus \$42.02 for the profit and overhead on the increase (15 percent of \$280.14 is \$42.02) for a net increase of \$322.16 in costs. The amount of Owner's credit is increased by \$1,054.40 (the \$2,849.51 paid, less \$1,795.11 credited on Exhibit 11). Since the additional credit due Owners (\$1,054.40) exceeds the additional costs due Contractor (\$322.16), we shall reduce the judgment by \$732.24 ( $\$1,054.40 - 322.16 = \$732.24$ ).

Third, Owners contend that there were mathematical errors related to the amounts disallowed by the trial court. We have already addressed that claim under the subheading “Profit Awarded on Items That Were Disallowed.”

Finally, there is one other mathematical error on the spreadsheet. The amounts billed for Chapin’s services total \$27,229.98, while the amounts listed as a credit to Owners for amounts paid to Chapin is \$29,439.33. The difference (\$2,209.35) is easily explained. Contractor forgot to list one of the Chapin invoices for \$2,209.35 in Exhibit 10 on the spreadsheet. Contractor is therefore entitled to that additional amount. But Contractor is not entitled to additional profit and overhead on that amount because its profit and overhead calculation included the missing invoice.

### **M. Summary**

Although we reject the majority of Owners’ contentions regarding the sufficiency of the evidence to support the judgment, we conclude that some of their arguments have merit and that the judgment must be modified as follows

Profit and overhead on disallowed amounts:	- \$3,270.00
Adjustment for disallowed permit-related costs:	- \$7.90
Amounts awarded for Kelso’s time	- \$8,142.00
Profit and overhead on administrative time:	- \$96.00
Mathematical error re Granite Construction:	- \$732.24
Mathematical error re Chapin:	+ <u>\$2,209.35</u>
Net modification/reduction:	- \$10,038.79

Based on these calculations, we will modify the judgment and reduce the amount of Contractor’s award to \$42,255.51 (\$52,294.30 minus \$10,038.79 equals \$42,255.51).

### ***III. Attorney Fees***

Owners argue that Contractor waived the right to attorney fees because the contract required the parties to resolve their disputes through binding arbitration. They also challenge the sufficiency of the evidence to support the amounts awarded as attorney fees.

#### **A. Contract Provisions**

The contract provides in paragraph 11.1: “Any dispute that arises which cannot be settled otherwise between the parties, will be resolved by binding arbitration.” Paragraph 11.1 provides for arbitration before a three-person panel and sets forth a procedure for the selection of the arbitrators. It also provides that the “decisions of any two of said arbitrators shall be binding and conclusive to all parties. In the event that arbitration is unsuccessful contractor reserves the right to sue for attorney fees if deemed necessary.”

Paragraph 13.1.1 of the contract provides in part: “If the Owner or the Contractor shall default on the contract, the nondefaulting party may declare the contract is in default and proceed against the defaulting party for the recovery of all damages incurred as a result of said breach of contract, including a reasonable attorney’s fee.”

#### **B. Contractor Did Not Waive his Right to Attorney Fees**

The legal basis for an attorney fees award is a question of law, which we review de novo. (*Leamon v. Krajciwicz* (2003) 107 Cal.App.4th 424, 431 (*Leamon*).)

Citing *Kalai v. Gray* (2003) 109 Cal.App.4th 768 (*Kalai*), Owners argue that Contractor waived the right to attorney fees because the contract required the parties to resolve their disputes through binding arbitration, not litigation. Owners’ reliance on *Kalai* is misplaced. *Kalai* involved a dispute between a homeowner and contractor in which the contract provided that arbitration was the “exclusive remedy” for resolving

disputes arising out of the contract and that the prevailing party to the arbitration would be entitled to recover reasonable attorney fees and costs incurred “in connection with the [a]rbitration.” (*Id.* at p. 771.) After a dispute arose, the homeowner filed a complaint in superior court. Rather than file a petition to compel arbitration, the contractor filed a motion for summary judgment based on the arbitration agreement. The court granted the motion and held that by filing a lawsuit, the homeowner had waived his right to arbitration. The court also awarded attorney fees to the contractor. (*Id.* at pp. 771-773.) The appellate court reversed. The court explained that when a plaintiff bypasses an arbitration agreement and files litigation, one of the defendant’s options is to treat the act as a waiver and adopt that waiver by submitting to the jurisdiction of the court. (*Id.* at p. 773.) However, the mere filing of a lawsuit does not constitute a waiver of the right to arbitrate. (*Id.* at p. 774.) The court also reversed the fee award, because the arbitration agreement in *Kalai* allowed “for an award of fees only in favor of the ‘prevailing party to [the a]rbitration’ ” and since the parties had not yet arbitrated their dispute any award of fees was premature. (*Id.* at p. 777.)

In this case, Contractor bypassed the arbitration requirement in the contract by filing litigation. Rather than file a motion to compel arbitration, Owners adopted Contractor’s waiver of the arbitration remedy by electing to submit to the jurisdiction of the court. (*Kalai, supra*, 109 Cal.App.4th at p. 773.) After they litigated their dispute on the merits, both sides waived the right to arbitration. (*Id.* at p. 774, citing *Doers v. Golden Gate Bridge, etc. Dist.* (1979) 23 Cal.3d 180, 185-188; see also *Jones, supra*, 34 Cal.2d at p. 867 [“the right to arbitrate was waived by both parties through the litigation of their rights”].)

The attorney fees provision in the contract here is much broader than the fee provision in *Kalai*. It provides that when there has been a breach, the nondefaulting party is entitled to recover “all damages incurred as a result of said breach of contract,

including a reasonable attorney's fee." Although the contract contains an arbitration provision, attorney fee provision does not limit fees to those related to arbitration.

Owners' reliance on *Frei v. Davey* (2004) 124 Cal.App.4th 1506 (*Frei*) and *Leamon, supra*, 107 Cal.App.4th 424 is also misplaced. The contracts in those cases provided that "a party otherwise entitled to recover attorney fees pursuant to the agreement may not recover those fees if that party commences an action ' "without first attempting to resolve the matter through mediation." ' ' " (*Leamon*, at p. 432; *Frei* at p. 1511-1512.) The contract in this case does not contain a comparable condition precedent.

For these reasons, we reject Owners' contention that Contractor waived his right to fees by not arbitrating the dispute.

### **C. Substantial Evidence Support the Fee Award**

As we have noted, there were two attorney fees motions: one filed by attorney Mahan in December 2010 at the time of the substitution of attorneys, which asked for \$50,645 in fees and was subsequently withdrawn, and one filed by attorney Rodriguez in April 2011, which renewed Mahan's fee request and requested an additional \$7,000 in fees for Rodriguez's time. The court awarded Mahan \$47,685 in fees and Rodriguez \$5,500 in fees. Owners do not contest the amount of fees awarded to Rodriguez, but do contest the fees awarded to Mahan, arguing that there was insufficient evidence to support the fees awarded.

We review the amount of fees awarded for an abuse of discretion. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 29.) A request for attorney fees is largely entrusted to the discretion of the trial court, whose ruling "will not be overturned in the absence of a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence." (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 577.) To overturn that determination on appeal, the objecting party

must demonstrate “a clear abuse of discretion.” (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1158.)

Mahan’s motion for attorney fees was supported by a declaration from Mahan, which set forth the amount of fees claimed and contained a copy of Mahan’s entire bill, which she authenticated in her declaration. When Rodriguez filed the second motion for attorney fees, he asked the court to judicially notice the fee motion filed by Mahan and attached another copy of Mahan’s bill to his declaration.

Owners argue there was insufficient evidence to support the fees awarded to Mahan because Mahan’s billing records were inadmissible hearsay and were not properly authenticated in the second motion because Rodriguez lacked personal knowledge of Mahan’s records. Owners acknowledge that Rodriguez asked the court to take judicial notice of the attorney fees motion filed by Mahan, but argue that while a court may take judicial notice of court records, the “truth of the matters asserted in such documents is not subject to judicial notice.”

We begin by reviewing the rules governing judicial notice of court records set forth in *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 (*Lockley*). The *Lockley* court explained: “ ‘Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.’ [Citation.] The court may in its discretion take judicial notice of any court record in the United States. (Evid. Code, § 451.) This includes any orders, findings of facts and conclusions of law, and judgments within court records. [Citations.] However, while courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files. [Citation.] Courts may not take judicial notice of allegations in affidavits, declarations

and probation reports in court records because such matters are reasonably subject to dispute and therefore require formal proof.”

We conclude the court properly considered Mahan’s declaration in the circumstances presented here. First, the evidence here is distinguishable from that in *Lockley* and the other cases Owners cite. In those cases, a party asked the court to judicially notice court or administrative board records from another case.<sup>18</sup> In this case, Contractor asked the court to consider an evidentiary declaration that had already been filed in the same case in support of the same motion. Although Rodriguez used judicial notice as the procedural vehicle to get Mahan’s declaration before the court, it was not necessary to ask the court to take judicial notice of evidence that had already been filed with the court in the same case. All Contractor needed to do was call the court’s attention to Mahan’s declaration and ask it to consider evidence that was already in its file. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 9:53.1a, p. 9(I)-31.).

Regarding Owners’ hearsay objection, declarations are hearsay and are generally inadmissible at trial, subject to several statutory exceptions. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1345.) Code of Civil Procedure section 2009 creates an exception to the hearsay rule and authorizes the use of declarations and affidavits in motion proceedings. (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 344; *North Beverly Park Homeowners Assn. v. Bisno* (2007) 147 Cal.App.4th 762, 778.)

---

<sup>18</sup> Owners cite *Lockley, supra*, 91 Cal.App.4th at p. 879-880, 883 (party asked superior court to judicially notice appeals board documents in workers’ compensation action and appellate opinion reviewing board decision); *Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 144, 145 (judicial notice in state court civil action of federal court order in criminal case); *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482-484 (judicial notice of pleadings and records filed in other superior court cases and administrative decision of state board); *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 856 (judicial notice of declaration filed in another case); and *Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1396 (states, but does not apply, the rules regarding judicial notice).

But evidentiary declarations submitted in support of motions must meet all the statutory requirements for admissibility of evidence at trial. This means the declaration must be from a competent witness having personal knowledge of the facts stated therein. (*Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1107.) Here, there was no issue regarding Mahan's competency. Her declaration states that she had personal knowledge of the amount of time, the types of services performed, and the amount of the fee charged for representing Contractor. The declaration also sets forth her hourly rates. Mahan attached a copy of her entire bill, which supported the fee claim. The itemized bill contains the dates of service, a description of each service performed, the amount of time involved, and the dollar value of each service. The bill was also properly authenticated; Mahan's declaration stated that the bill was a true and correct copy of her own bill. This was all that was required. (*Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 523.)

For these reasons, we reject each of Owners' arguments regarding the sufficiency of the evidence to support the award of attorney fees and hold that the trial court did not abuse its discretion when it considered Mahan's declaration and awarded her fees.

**DISPOSITION**

The judgment is modified to reflect a reduction of \$10,038.79 in the amount awarded to Contractor, for a total judgment of \$42,255.51. As so modified, the judgment is affirmed. The order on the motion for attorney fees is also affirmed. Contractor is awarded its costs on appeal.

---

Márquez, J.

WE CONCUR:

---

Elia, Acting P. J.

---

Bamattre-Manoukian, J.